THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

A.O. No. 829 of 2001

(Old F.A.F.O. No. 22 of 1999)

Sri Rajiv Agarwal S/o Sri S.P. Agarwal
Owner, Tanker No. Up-01/0346 Care of Jai
Ambey Oil Company Bageshwar, District
Almora, Uttar Pradesh. … **Appellants.**

Versus

1. Hosiyar Singh Bajeti S/o Late Sri Govind Singh Bejeti, Resident of Village Kalet Post Office Manan Patti Kshetra Tana, Sajoli Tehsil and District- Almora.
2. Sri Daya Kishan Saklani S/o Sri Bal Kishan Saklani Driver Tanker No. UP-01/0346 resident District- Nainital (U.P).
3. New India Insurance Company Limited, Ayub Khan Chauraha, Bareilly…. **Respondents**

With

1. A.O. No. 828 of 2001

(Old F.A.F.O. No. 20 of 1999)

Sri Rajiv Agarwal S/o Sri S.P. Agarwal
Owner, Tanker No. Up-01/0346 Care of Jai
Ambey Oil Company Bageshwar, District
Almora, Uttar Pradesh. … **Appellants.**

Versus

1. Hosiyar Singh Bajeti S/o Late Sri Govind Singh Bejeti, Resident of Village Kalet Post Office Manan Patti Kshetra Tana, Sajoli Tehsil and District- Almora.
2. Sri Daya Kishan Saklani S/o Sri Bal Kishan Saklani Driver Tanker No. UP-01/0346 resident Of Tiriya Masauli Thana Khatima District- Nainital (U.P).
3. New India Insurance Company Limited, Ayub Khan Chauraha, Bareilly…. **Respondents**

and

2. A.O. No. 830 of 2001

(Old F.A.F.O. No. 23 of 1999)

Sri Rajiv Agarwal S/o Sri S.P. Agarwal
Owner, Tanker No. Up-01/0346 Care of Jai
Ambey Oil Company Bageshwar, District
Almora, Uttar Pradesh. … **Appellants.**

Versus

1. Hosiyar Singh Bajeti S/o Late Sri Govind Singh Bejeti, Resident of Village Kalet Post Office Manan Patti Kshetra Tana, Sajoli Tehsil and District- Almora.
2. Sri Daya Kishan Saklani S/o Sri Bal Kishan Saklani Driver Tanker No. UP-01/0346 resident Of Tiriya Masauli Thana Khatima District- Nainital (U.P).
3. New India Insurance Company Limited, Ayub Khan Chauraha, Bareilly

Sri Sarvesh Agarwal learned counsel for the appellant.
Sri R.B. Agarwal learned counsel for the respondents- Insurance Company

Dated May 08, 2006.

P.C: Hon. B.S.Verma, J.

All these three appeals under Section 173 of the Motor Vehicles Act, 1988 (***for short the Act***) arise out of the judgment and award dated 5-11-1998 passed by the Motor accident Claims Tribunal/District Judge, Almora (for short the Tribunal), whereby the Tribunal has decided M.A.C. Petition Nos. 17 of 1995, 18 of 1995, 19 of 1995 (Hosiyar Singh Bajeli Vs. Shri Rajiv Agarwal and two others as well as M.A.C. Petition No. 20 of 1995, which have arisen out of the same motor accident and all the four claim petitions have been decided by a common judgment, therefore, these three appeals are being decided by this common judgment for convenient, as the controversy involved therein is the same.

Relevant facts of the case are that the claimant Hosiyar Singh Bajeli filed three separate claim petitions before the learned Tribunal, claiming compensation of Rs. 3,60,000/- in respect of death of Govind Singh, Rs. 1,80,000/- in respect of death of Smt. Radhika Devi and Rs. 60,000/- for the death of Master Pawan Singh, who were son, daughter-in-law and minor son of the claimant, who died as a result of injuries suffered by them due to rash and negligent driver of Tanker No. UP 01-0346 on 2-9-1994 at 11.20 a.m. at Dararіya (Ranman) within the limits of Police Station Someshwar. The owner of vehicle Rajiv Agarwal is the appellant. The driver of

the vehicle is Daya Kishan Saklani and the vehicle was insured with New India Assurance Company, who are respondent nos. 2 and 3 respectively.

The driver, owner and insurer of the vehicle contested the case by filing their written statements separately. The owner has admitted the ownership of the Tanker and its due insurance with the Insurance Company. He has denied that the claimant is the legal heirs of the deceased. It was denied that the accident in question occurred due to rash and negligent driving of the vehicle by its driver, rather the accident is said to have taken place due to failure of brakes. It was asserted that the driver that he was not responsible for the accident and the accident took place as the steering of the Tanker became jam and the brakes failed to function. Due to agitation for creation of the State of Uttarakhand, no vehicle was available to the deceased, who stopped the Tanker and requested him to carry them to Someshwar and on humanitarian ground, they were allowed to travel in the Tanker without realizing any fare from them.

The owner of the vehicle-appellant has asserted that the vehicle was insured with the New India Assurance Company, which had not been arrayed as party, therefore, the claim petition was defective. The owner has taken similar stand as that was taken by the driver. It was further pleaded that the driver of the tanker was having a valid driving licence on the date of accident. It was also asserted that the liability to pay compensation rests upon the insurer of the vehicle. It was further stated that the passengers were travelling in the vehicle at their own risk. Quantum of compensation has also been challenged.

The Insurance Company in its written statement denied the allegations made in the claim petition. According to the insurer, the Tanker was used in violation of the policy conditions and the driver was not having a valid driving licence. The owner has to produce valid papers in respect of the Tanker on the date of accident.

It was also stated that the vehicle was driven by an unauthorised driver, the claim petition are not maintainable. It was also pleaded by way of amendment that the vehicle being Tanker no passenger could be taken in the Tanker as passenger and that too beyond its prescribed capacity.

The learned Tribunal framed the following issues in the case:-

1. Whether the accident in question was a result of the rash and negligent driving of the vehicle No. U.P.-01-0346 driven by O.P.No. 2?

2. Whether the O.P.No.1 committed breach of the terms and conditions of the Insurance Policy? If so, its effect?

3. To what amount of compensation, if any, are the claimants entitled and from which of the O.Ps.?

It may noted that before the Tribunal, the entire evidence of the parties was recorded in M.A.C. Petition No.17 of 1995, which was to be read in all the four claim petitions decided by the Tribunal by common judgment as mentioned earlier.

After recording the evidence of the parties and perusing the same, the learned Tribunal took Issue No.1 for decision. The learned Tribunal after scrutinizing the material on record came to the conclusion that the accident in question occurred due to the negligence on the part of the driver of the Tanker. On issue no.2, it was concluded that the passengers travelling by the Tanker were not the labourers for loading or unloading the kerosene oil contained in the Tanker, therefore, the conditions of the Insurance Policy were violated. Accordingly it was held that the Insurance Company was not liable for payment of compensation. On Issue No.3, it was observed that the passengers had contributed to the negligence, therefore, the learned Tribunal on the principle of no fault liability, awarded compensation of Rs. 25,000/- each for the deaths of Govind Singh, Smt. Radhika Devi and master Pawan Singh and the claim

petition was accordingly decreed and claimant was also awarded interest @ 12% per annum from the date of filing of claim petition till the date of payment against the owner of the Tanker Rajeev Agarwal, the appellant.

In these appeals, the impugned judgment and award has been assailed mainly on the ground that the finding of the Tribunal holding that the driver of the Tanker was responsible for the accident is against the evidence on record. It was also contended that the passenger who boarded the Tanker loaded with oil were themselves responsible for the illegal act as there was no consent of the driver to allow them to travel by the said vehicle rather they forcibly took the lift being the persons of Uttarakhand Movement.

Sri Sarvesh Agarwal, learned counsel for the appellant has vehemently argued that the Tanker was insured for five non-fair paying passengers and no amount was paid by them. On the other hand, learned counsel for the Insurance Company while supporting the finding of the Tribunal submitted that even the non-fare paying passengers were not covered under the Insurance Policy. The deceased persons being gratuitous passengers the Insurance Company was rightly held not responsible for the compensation.

I have considered the submissions made by the learned counsel for the rival parties and have scrutinized the entire evidence as well as the impugned judgment.

So far as the finding on the issue of rash and negligent driving by the driver of the tanker in question is concerned, the learned Tribunal has elaborately considered the evidence on record. The important aspect of the case in this regard is that on the basis of The information lodged with the police by one Surendra Singh Bisht, investigation of the case was conducted by the police and ultimately after investigation of the case, a criminal proceeding was initiated against Daya Kishan Saklani, driver of the oil tanker, and he was

prosecuted for the offence Case Crime No. 76 of 1994 under section 279, 338 and 304 A of the I.P.C. The driver was charge-sheeted. This fact is admitted to the owner, but it was argued that since the case against the driver ended in his acquittal, it couldn't be said that he was driving the vehicle negligently. I am not inclined to accept this contention for the simple reason that in the proceedings for compensation before the Tribunal, it is not necessary for the claimants to have strictly proved the factum of negligence. It is generally seen that in the course of criminal proceedings, the witnesses of the fact are declared hostile and on technical ground, the accused has to be acquitted. The judgment of acquittal of the driver does not show any such finding of the Magistrate that the accused person (driver) was falsely prosecuted by the police. It is not disputed that the oil tanker was completely damaged in the accident and thereafter the technical examination of the vehicle was conducted. The driver of the vehicle had filed his written statement in the case, but he could not dare to appear in the witness box to controvert the contention that there was no negligence on this part, whereas from the side of the claimants beside the claimant Hoshiyar Singh, P.W.2 Bachi Singh Bhandari and P.W.3, Madan Singh had appeared as witnesses to prove the allegations made in the claim petition. It is pertinent to note that there is a finding of the Tribunal that the deceased persons had contributed to the negligence besides the driver of the oil Tanker. In my opinion, the learned Tribunal has rightly held that when the driver was available and he was not produced as witness, an adverse inference was to be drawn against the owner and the driver. The findings of the Tribunal are to be based on probabilities and not on the basis of strict proof of any fact. The finding of the Tribunal on the issue of negligence on the part of driver does not required any interference.

It is admitted case that the vehicl, which met with an accident was a oil tanker Copy of Insurance Policy is on record a paper no.34-C. The owner has admitted this document. A premium of Rs. 250/- was paid towards condition no.3, i.e. for LL to non-fare

paying passengers IMT 13. It is the positive case of the claimants that the deceased person were travelling by the Oil Tanker after paying fare. Had the driver been produced in the witness box and in case, it could have been brought on record that no fare was paid by the persons who boarded the Tanker, the position would have been otherwise. It has not been shown that the deceased were owner of the goods or that they were labourers or employees of the owner. The deceased persons were clearly gratuitous passengers, as submitted by the learned counsel the insurance company. Moreover, on behalf of the Insurance Company, Sri R.P.Misra, Branch Manager of the insurer, has been examined as D.W.2. He has clearly deposed that the vehicle in question was not meant for carrying persons other than driver, cleaner and five labourers under the employment of the owner. This statement of D.W.2 has not been challenged in cross-examination from the side of the owner-appellant. The testimony of D.W.2 read with the copy of Insurance Policy on record leads to an inference that in the present case the policy conditions were clearly violated, therefore, the learned Tribunal was fully justified in fastening the liability upon the owner. The owner of the vehicle/owner Sri Rajeev Agarwal has not appeared in the witness box to substantiate the contention raised by him in the written statement, for the reasons best known to the owner.

Moreover, there is one strong circumstance against the owner of the vehicle. The learned Tribunal has awarded only a sum of the Rs. 25,000/- each in favour of the claimant for death of the three deceased persons on the principle of no-fault liability as prevailing on the date of accident, i.e. 2-9-1994, for which the liability to pay compensation rests upon the owner/owners. No compensation has been awarded taking into consideration the loss of dependency, income of the deceased etc. There is no finding of the Tribunal on that count. Therefore, in any view of the matter, it is not open for the owner of the vehicle to challenge the finding of the Tribunal whereby compensation of Rs. 25,000/- each for death of

three persons was allowed only on the principle of no-fault liability, though the learned Tribunal has decided the claim petitions under the provisions of Section 166 of the Act. Even on this ground alone, the appeals are liable to be dismissed.

For the reasons and discussion aforesaid, the appeals preferred by the owner of the vehicle are devoid of merit and are liable to be dismissed.

All the three appeals are hereby dismissed. The impugned judgment and award dated 5.11.1998 is upheld. No order as to costs.

The amount in deposit with this Court, if any, be remitted to the Tribunal concerned for being paid to the claimant.

(B.S.Verma, J.)

RCP